U.S. Department of Labor Office of Administrative Law Judges
Washington, DC

In the Matter of

Case No. ETA-l

CHICK ORCHARDS,
Respondent

Decision and Order

Statement of the Case

This proceeding arises under the Wagner-Peyser Act of 1933,as amended, 29 U.S.C. Ch.4B (1976) [the WPA] and the regulations promulgated thereunder. The United States Employment Service was established under the WPA as a Department of Labor [DOL] agency. The duties of the Employment Service include the maintenance of a "farm placement service," "systems of public employment offices in the several states," and a "system for clearing labor between the several states." 29 U.S.C. §49b(a)(1976). The Secretary is authorized to make such rules and regulations as may be necessary to carry out 29 U.S.C. §49b. 29 U.S.C. §49k(1976). The basic issues in this case are whether the respondent Chick Orchards, Inc. [Chick] violated DOL regulations by underpaying apple-pickers and, if so, whether the United States Employment Service may deny Chick its services pickers for back wages until Chick reimburses those apple-pickers for back wages.

After due notice, hearings were held on June 26 and 27, 1979, in Augusta, Maine. the parties were given full opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. brief. Counsel for each party filed a post-hearing Based on the entire record and the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

Findings and Conclusions

I. Factual Background

Chick is a family corporation business in Maine. engaged in the apple growing In anticipation of a harvest worker shortage, Chick filed a clearance order with the Maine Employment Service in February, 1976. The order offered ".35 per bushel" for strip picking and It .25 per bushel" for drop picking, with guaranteed hourly wages of $2.46. The job offer was posted at an unemployment office in Maine where it was seen by the complainant John Wenckus. Wenckus and many other workers accepted the offered employment.

Each Chick worker picked apples into a bag held on his chest and dumped them into a large wooden crate. The pickers were told that the bags held one-half bushel and that the crates

held fifteen bushels. After Wenckus discovered that the crates held more than fifteen bushels as defined in publications of the National Bureau of Standards [standard bushel], he filed the complaint dated October 8, 1976, which initiated this case. Chick's wood crates in fact held 16.86 standard bushels. Thus, Chick actually underpaid the pickers by paying .35 for approximately every standard bushel and one-eighth of strip picked apples.

II. Custom and Usage

Chick has attempted to prove that proper wages were paid by showing that the term "bushel" as used in its clearance order meant something other than a standard bushel. Chick contends that because of custom and usage in the Northeast United States and in Maine in particular, "bushel" is synonymous with "eastern apple box," a unit of measure equal to one and one-eighth standard bushels. This argument must be rejected for several reasons.

During 1976, the Maine Weights and Measures Law provided that:

> The system of weights and measures in customary use in the United States and the metric system of weights and measures are jointly recognized and either one or both of these systems shall be used for all commercial purposes in the State. The definitions of basic units of weight and measure, the tables of weight and measure and weights and measures equivalents as published by the National Bureau of Standards are recognized and shall govern weighing and measuring equipment and transactions in the State.

10 M.R.S.A. §2351. Thus, the statutory definition of "bushel“ was a standard bushel.

Chick also cites 7 M.R.S.A. §532 which, in 1976, provided that: "A box having the capacity of 2,431 cubic inches [the eastern apple box's volume] shall be a lawful box." In 1977, Chick's chairman of the board successfully lobbied the Maine legislature which amended 7 M.R.S.A. the word "bushel" §532 by substituting for the final word "box." Chick maintains that the 1977 amendment clarified rather than altered the meaning of 7 M.R.S.A. §532. I disagree. Given the clear change in terminology, it appears that Chick is seeking retroactive application of a substantively new statute which was passed in direct response to the instant case. Under the 1976 statutes of Maine, "bushel" meant a standard bushel and not an eastern apple box.

Even if the statutes of Maine were conflicting, ambiguous, or otherwise not dispositive of this point, I would reject Chick's argument that according to custom and usage, "bushel" meant "eastern apple box" in the 1976 clearance order. It must first be conceded that the eastern apple box has been widely used in the production and distribution of apples in Maine both as a unit of measure and as a container for pickers. It may also have been referred to as a bushel by some people.

About 1965, however, growers shifted to the use of fifteen to nineteen bushel bins for containers such as that used by Wenckus. By 1976, boxes by pickers. there was virtually no use of eastern apple In addition, unlike Chick's bins, some Maine growers' bins did not deviate

significantly from the standard bushel measure. This accorded with the expectations of DOL. Meanwhile, in New York state, clearance orders distinguished between wages paid by the bushel and wages paid by the bushel and one-eighth. Chick's clearance order was distributed to Puerto Rico and the labor-rich states of Florida, Alabama, Mississippi, Texas, Louisiana, and Arkansas. There was no evidence that workers from those areas ***were*** familiar with the eastern apple box. Indeed, even inexperienced local pickers like Wenckus did not know about the eastern apple box. Obviously, Chick was or should have been aware of any ambiguity in the term "bushel;" most of its prospective employees were not: and Chick knew or should have known that they ***were*** not. Chick nevertheless chose to use the term "bushel" in its clearance order rather than "bushel and one-eighth" or "eastern apple box." Under these circumstances, the risk of loss arising from the choice of an ambiguous wage term must lie with Chick: "bushel" must be interpreted to mean a standard bushel. See Restatement of Contracts 2d, §227; Restatement of Contracts, §233.

III. Violations of Regulations

DOL first claims that Chick violated 20 C.F.R. §602.9(c)(1976) which provided that:

> No order for recruitment of domestic agricultural workers shall be placed unless:
>
> (c) The State agency offered are not less than area of employment among into interstate-clearance has ascertained that wages the wages prevailing in the similarly employed domestic agricultural workers recruited within the State and not less than those prevailing in the area of employment among similarly employed domestic agricultural workers recruited outside the State.

DOL offered no direct proof of the 1976 prevailing wage for Maine agricultural workers, it only submitted exhibits concerning subsequent periods. See Exh. G-19. Furthermore, Chick's clearance order guaranteed the 1976 Maine minimum wage of $2.46 as required by 20 C.F.R. §602.101(a)(l) (1976). I therefore find no violation of 20 C.F.R. §602.9(c) (1976).

DOL also cites 20 C.F.R. §653.108(b)(l) (1978), which took effect in February, 1977, and effectively prohibited material misrepresentations in job orders. DOL argues that this regulation "did not create a new obligation for employers: it merely stated in more specific terms . . . the obligation . . contained in the prior regulations at 20 C.F.R. Part 602." DOL Brief at 7. Like Chick, DOL is attempting to retroactively apply legislative rule of law which favors its position in this case. DOL's attempt is likewise rejected.

DOL contends that Chick violated another 1976 regulation, 20 C.F.R. §602.10(e), which provides that: Certifications [for temporary foreign labor for agricultural employment] will be denied in whole or in part if the findings set forth in paragraph (d) of this section cannot be made . . . ." Paragraph (d) allows certification only if the Regional Administrator of DOL's Employment Training Administration finds that the employer has made reasonable efforts to obtain domestic workers. Chick's efforts to recruit domestic workers based on a misleading wage term could not have been reasonable, since they violated two provisions of the regulations

expressly incorporated by 20 C.F.R. §602.10(b), namely sections 602.10a(a) and 602.10a(i). The employer must give each worker a statement of the terms of employment under, section 602.10a(a) and must keep accurate records of workers' earnings under section 602.10a(i). Moreover, requests for certification are expressly conditioned on the employer's filing an offer in accordance with section 602.10a. Thus Chick violated section 602.10(d) as incorporated in section 602.10(e).

At the time of Wenckus' complaint, section 602.10(e)(l) provided for the denial of certifications "where the employer has been found to have failed without good cause to comply with employment contracts with United States or foreign agricultural or logging workers." According to the regulations, Chick's job offer took the form of a written contract when accepted. 20 C.F.R. §602.10a(a) (1976). By underpaying its pickers in 1976, Chick certainly failed to comply with that contract. For the same reasons that caused Chick to bear the risk of choosing an ambiguous wage term, Chick's failure was without good cause. Good cause might have existed if an act of God had destroyed Chick's crop and prevented compliance with the contract, but that was not the case. Where an employer, like Chick, through its own fault fails to comply with the employment contract, good cause does not exist. Chick therefore violated section 602.10(e)(l).

IV. Remedy

Because violations have been found, the question arises as to what is the proper remedy. The answer requires an explanation of the procedural posture of this case. After investigating the Wenckus complaint, DOL notified Chick on January 20, 1977, that any future certification of foreign workers would be conditioned upon Chick's paying its 1976 workers the difference between what they earned based on the eastern apple box and what they would have earned based on the standard bushel. Such a denial of certification would have been authorized by the 1976 regulations under 20 C.F.R. §602,10(e). Procedural confusion apparently arose because new regulations, 20 C.F.R. Part 658, took effect in February, 1977, establishing a complaint system for Employment Service related complaints.

By late July, 1977, Chick had agreed to submit this matter to an administrative law judge for hearing in return for assurances that temporary labor certifications for ensuing harvests would not be denied. No certifications were denied, and hearings were held on June 26 and 27, 1979.

Violations of the regulations having been found, another question of retroactivity arises in determining the proper relief. In addition to creating a new procedural system, the 1977 regulations added to the substantive sanctions which can he invoked against an employer who violates the regulations. Subpart F of Part 658 of the 1977 regulations authorizes the discontinuation of "all" Employment Service services. The distinction may be of little practical importance, but the 1976 regulations only authorize the denial of temporary certifications for foreign workers. DOL's handling of this case has been far from clear, but it apparently did not suggest the denial of all services until the prehearing conference of March 29, 1979. Transcript at 27. Prior correspondence consistently referred only to denial of temporary labor certifications for foreign workers. See Exhs. G-3, G-6, G-7. DOL now seeks an order denying Chick all Employment Service services until it makes restitution of back wages.

Procedurally, there is nothing wrong with submitting this case to an administrative law judge under Part 658, since this case certainly arises from an Employment Service related complaint.[1] Chick, however, contends that invalid because state and regional remedies these proceedings are were not exhausted as required by the regulations. This contention is without merit for two reasons. First, Part 658 took effect after the state and regional determination had, as a practical matter, already been made. Second, by agreeing to submit to a hearing in return for certifications, Chick waived any objection based on exhaustion of administrative remedies.

Substantively speaking, there is no evidence that by agreeing to a hearing Chick intended to subject itself to the broader sanction of total denial of Employment Service services. It would be unfair to retroactively apply a regulation with such apparent substantive effect. Relief will thus be limited to a denial of temporary labor certifications pending reimbursement of 1976 pickers.[2]

It is therefore ordered that Chick be denied certifications for temporary foreign labor for agricultural and logging employment until such time as it satisfies the Regional Administrator of the Employment Training Administration that it has paid wages in full to all 1976 apple pickers Maine Department of Manpower as specified by DOL and the Affairs in Exhibits G-3 and G-9.

RHEA M. BURROW
Administrative Law Judge

Dated: December 27, 1979
Washington, D.C.
RB:dl

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[1] I have already ruled that this is a proceeding by DOL to enforce its regulations, not an action by DOL on behalf of Chick's workers. Thus, Chick's argument that DOL has no authority under the WPA to represent Chick's workers or to adjudicate a contract dispute need not be addressed. Any contract questions which have arisen are merely incidental to the format and subject matter of the regulations being enforced. Wenckus' status as a participant in these proceeding has been essentially that of an intervenor. This decision is in no way meant to be a statement of his rights beyond the extent to which they are effected by DOL's rights as determined herein.

[2] Chick's argument that the WPA confers no authority on DOL to order restitution is irrelevant. It is a conditional denial of temporary labor certifications which is being ordered here, not restitution.